

KING & SPALDING

King & Spalding LLP
1700 Pennsylvania Ave, NW
Suite 200
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737
www.kslaw.com

Thomas J. Spulak
Direct Dial: +1 202 661 7948
tspulak@kslaw.com

November 25, 2013

Mr. Jeff S. Jordan
Office of the General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

RE: MUR 6748

Dear Mr. Jordan:

King & Spalding LLP represents the Pharmaceutical Research and Manufacturers of America ("PhRMA"). This letter responds to a Complaint filed with the Federal Election Commission ("FEC" or "Commission") against Representative Colleen Hanabusa ("Hanabusa"), alleging that representatives of PhRMA coordinated with Hanabusa and her advisors in the making of independent expenditures in violation of the Federal Election Campaign Act ("FECA") and accompanying regulations. While not named as a respondent, PhRMA unequivocally denies this allegation for the reasons described below, including the affidavits of Nick Shipley and Robert Filippone (hereinafter, "Shipley Aff." and "Filippone Aff.," respectively), which are attached hereto and incorporated by reference as part of this response. Accordingly, the Commission should find no reason to believe that PhRMA violated FECA or its accompanying regulations.

A. BACKGROUND

PhRMA is an Internal Revenue Code section 501(c)(6) trade association representing pharmaceutical companies. In its role representing the interests of the innovative biopharmaceutical industry, PhRMA actively is involved in legislative advocacy. It often testifies before Congress and takes positions on regulations and legislation. As part of this effort, its representatives often meet with Members of Congress.

PhRMA sponsors a political action committee registered with the FEC, the Pharmaceutical Research & Manufacturers of America Better Government Committee ("PAC"). Through it, PhRMA supports candidates on a bipartisan basis who it believes understand the issues that are important to its membership.

PhRMA staff receive regular training on FEC rules, including the rules against coordination, as well as congressional ethics, and understand the requirements to keep campaign issues and official issues separate.

PhRMA staff will from time to time examine congressional races to determine what the outcome of a race might mean to issues that are of importance to its members. As a result of this research, PhRMA might participate in a fundraising event through its PAC.

PhRMA never has and never will use its PAC to obtain support from an officeholder nor reward an officeholder for a position taken. It is concerned about educating Members of Congress on the issues important to the pharmaceutical industry.

B. FACTS

As part of his regular responsibilities, Nick Shipley, Senior Director Federal Affairs at PhRMA, participated in a pharmaceutical industry "meet and greet" during which attendees had an opportunity to meet with Hanabusa and learn about her positions on issues of importance to the industry.

The meet and greet was not a fundraising event; no funds were solicited or disbursed. While at the event, Shipley spoke with a member of Hanabusa's staff, Chris Raymond. After the meeting, Raymond emailed Shipley and offered to arrange a meeting with Hanabusa. Shipley consulted with a superior, Robert Filippone, and on June 26, 2013, Shipley and Filippone met with Hanabusa and a member of her campaign staff. Raymond was not in attendance.

At the meeting, Shipley recalls that:

[There] was a very broad overview of what Representative Hanabusa works on, her race for the U.S. Senate essentially focusing on how she saw the race unfolding, who was ahead, the Hawaiian demographic breakdown and other general issues in the nascent race. Filippone mentioned ways that PhRMA has supported candidates in the past, but except for possibly some mention of a potential PAC event, we did not discuss any options including independent media buys that PhRMA would consider if it decided to support Representative Hanabusa on her campaign. No commitment was made about what, if anything, PhRMA might do to support the campaign.

Shipley Aff. ¶ 6.

According to Filippone:

I told Representative Hanabusa about ways that PhRMA has supported candidates in the past, but there was no discussion about political support to Representative Hanabusa other than mentioning that a PAC fundraiser may be something PhRMA would consider doing. There was no discussion of providing support to

her through an independent media buy. We did not commit that PhRMA would organize a PAC event.

Filippone Aff. ¶ 6.

At the end of the meeting, Shipley and Filippone asked Hanabusa whom they might speak with outside the campaign to obtain further insights into Hawaiian politics. They were given the names of three individuals, Jennifer Sabas and Peter Boylan—two former staffers for the late Senator Daniel Inouye—and John Miyasato, a campaign consultant. Shipley Aff. ¶ 7.

After the meeting with Hanabusa, Raymond and Shipley had an email exchange in which Shipley asked for contact information for Sabas, Boylan, and Miyasato. Shipley indicated that PhRMA could help with PAC donations but also that it would look “at doing some independent stuff as well.” By independent stuff, Shipley states that he was referring to “a number of things other than PAC contributions that PhRMA might consider.” Shipley Aff. ¶ 9.

After receiving contact information, including for Sabas and Boylan, and subsequent communications to arrange a meeting, Filippone and Shipley met with Sabas and Miyasato. No meeting was arranged with Boylan.

At the outset of the meeting, Filippone asked both Sabas and Miyasato whether they had an official role in the race or had a position in Hanabusa’s Senate campaign. They were told no. Miyasato stated that he had worked on a previous race but had done nothing since then. Shipley Aff. ¶ 12; Filippone Aff. ¶ 10.

During the meeting, the four discussed the race in general terms. As Filippone describes:

We had a general discussion about Hawaiian politics, the political motivations of the state as a whole and among the various islands that comprise the state. We talked generally about what Sabas and Miyasato thought would be important in the race, polling numbers, key issues, who was supporting and opposing Representative Hanabusa and whether she had a chance to win the election. I am not sure, but we may have mentioned the possibility of a PAC event, but no commitments were made. There was no discussion about any independent communication or media expenditures for Hanabusa’s campaign. At this point, no decision had been made that PhRMA would organize a PAC event.

Filippone Aff. ¶ 11.

At no time did Shipley, Filippone, or any other representative of PhRMA discuss or offer to undertake any independent expenditures on Hanabusa’s behalf. As stated by Shipley:

Our purpose in attending the two meetings was to establish a benchmark of knowledge about Hawaiian politics and the race in general so that we would be in a better position to monitor and evaluate the race. At neither of these meetings,

nor at any time since the July 26th meeting, was there any discussion of possible independent media expenditures, communications or advertisements in support of Representative Hanabusa.

Shipley Aff. ¶ 13.

C. LEGAL ANALYSIS

1. ALLEGATION 1

The Complaint alleges that Hanabusa violated 2 U.S.C. § 441i(e)(1) by "soliciting and preparing to spend 'soft money.'" The basis for this allegation is the fallacious assertion that Hanabusa and others in her campaign coordinated with representatives of PhRMA thereby rendering any expenditure an impermissible soft money contribution. As the facts indicate, there was no coordination and there were no expenditures. As a result, there can be no violation and the Commission must find that PhRMA did not violate FECA or its accompanying regulations.

a. DISCUSSION

Since the Supreme Court decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), both for profit and not for profit corporations may legally expend unlimited amounts of corporate treasury funds on independent expenditures. An "independent expenditure" is defined as an expenditure:

(A) expressly advocating the election or defeat of a clearly identified candidate;
and

(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

2 U.S.C. § 431(17).

Such expenditures must be conducted independently of any federal candidate. Expenditures that are "coordinated" by definition are not "independent" and may be deemed a corporate contribution in violation of 2 U.S.C. § 441b. On the other hand, where there is no coordination, a corporation may expend unlimited funds on communications that advocate the election or defeat of a federal candidate. *See generally Citizens United*.

Candidates and officeholders, or their agents, may not solicit, receive, direct, transfer, or spend funds in connection with an election for federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. § 441i(e)(1)(a). Allegation 1 of the Complaint states that Hanabusa and others associated with her campaign coordinated corporate independent expenditures with representatives of PhRMA. If true, Hanabusa would have solicited soft money in violation of section 441i(e)(1)(a).

"Coordination" is a term of art as described in 11 C.F.R. §§ 109.20-109.23. The Commission's test for coordination is based on three elements or "prongs": Payment, Content, and Conduct. All three of the prongs must be satisfied in order to find coordination. If there is no coordination, then an expenditure is independent and permissible under *Citizens United*.

As demonstrated, below, in applying the Commission's definition of coordination to the instant facts, there was no coordination thereby rendering Allegation 1 baseless.

(1) There was no coordination.

The Commission's regulations on coordination address *coordinated communications*. At the outset, it is uncontroverted that there were no communications financed by PhRMA nor were there ever any plans for any communications financed by PhRMA. Nevertheless, we will analyze the facts against the Commission's three-prong test for coordination.

The Payment Prong: There was no payment made by PhRMA, therefore this prong is not satisfied. 11 C.F.R. § 109.21(a)(1).

The Content Prong: There was no communication—and no content—that resulted from any discussions with Hanabusa and anyone associated with her, therefore this prong is not satisfied. 11 C.F.R. § 109.21(c)

The Conduct Prong: There are five standards which must be considered to determine if the conduct prong is satisfied. We address each and demonstrate that the conduct prong also was not satisfied.

(1) No communication was created, produced, or distributed at the request or suggestion of Hanabusa or her agents¹ nor did she or they assent to a suggestion for the creation, production, or distribution of a communication financed by PhRMA. 11 C.F.R. § 109.21(d)(1).

(2) Neither Hanabusa nor her agents were materially involved in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, timing or frequency, or size or prominence of a communication financed by PhRMA. 11 C.F.R. § 109.21(d)(2).

¹ The two individuals with whom Filippone and Shipley met beside Hanabusa—Jennifer Sabas and John Miyasato—were not agents of Hanabusa. To be an agent of a Hanabusa, Sabas or Miyasato would have had to have actual authorization, either express or implied, from Hanabusa or her committee to engage in specific activities, and then engage in those activities on behalf of Hanabusa. 11 C.F.R. § 109.3(b). But even if they are viewed as agents, the only activity in which Sabas or Miyasato engaged was a general discussion of Hawaiian politics and their opinion of the early stages of Hanabusa's race.

(3) No communication was created, produced, or distributed after one or more *substantial discussions* between PhRMA and Hanabusa or her agents. In fact, there were no discussions whatsoever regarding any communications. 11 C.F.R. § 109.21(d)(3).

(4) There were no common vendors employed to produce communications. 11 C.F.R. § 109.21(d)(4).

(5) No one who was an employee or independent contractor of Hanabusa's campaign committee within the past 120 days used or conveyed information about the plans or needs of Hanabusa to PhRMA which was material to the creation, production, or distribution of a communication.² 11 C.F.R. § 109.21(d)(5).

There was no request for independent expenditures made by Hanabusa or anyone associated with her. Nor were there any discussions about the making of independent expenditures by representatives of PhRMA. Finally, there were no expenditures made by PhRMA involving Hanabusa's race in the past nor does PhRMA have any plans to do so in the future. Thus, there were no violations of 2 U.S.C. § 441(e) (1)(a) or 2 U.S.C. § 441b.

2. ALLEGATION 2

Allegation 2 of the Complaint states that Hanabusa violated the Code of Official Conduct for the U.S. House of Representatives (the "Code"). The Commission does not have jurisdiction over the Code. Nevertheless, any suggestion that PhRMA engaged in any activity that could have contributed to a violation of the Code by Hanabusa is absolutely and unequivocally false and denied.

D. CONCLUSION

In accordance with the foregoing, we request that the Commission find that there is no reason to believe that PhRMA violated FECA or its accompanying regulations.

Sincerely,



Thomas J. Spulak

Enclosures

² As discussed, above, Miyasato may have been a consultant to Hanabusa's previous campaign for the House in 2012. The meeting with Shipley and Filippone occurred more than 120 days since that time; moreover, he was involved in a different race, *i.e.*, a race for the U.S. House of Representatives, not the U.S. Senate.